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Supreme Court, U.S.
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No. 97-657

In The

Supreme Court of the United States

October Term, 1997

RICHARD CARROLL,

Petitioner,

vs.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent Federal Express Corporation respectfully submits that the actual issues presented by the Petition for a Writ of Certiorari of Richard Carroll are as follows:

1. Whether Carroll may, for the first time in his Petition, raise the argument that federal instead of California state law governs his claim.

2. Whether, as a matter of law, a *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), action may be maintained against Federal Express as a corporate entity or whether such an action is limited to individual defendants.

3. Whether, as a matter of law, Federal Express can be deemed a "federal actor" in terminating Petitioner's employment as required to invoke the substantive due process protections of the Fifth Amendment of the United States Constitution.

4. Whether the procedural due process requirements of the Fifth Amendment are coextensive with Department of Transportation Regulations concerning mandatory drug testing and, if so, whether Carroll can possibly establish any violation of those Regulations under the circumstances.

5. Whether an employee subject to Department of Transportation Regulations who fails a mandatory drug test is entitled to a jury trial whenever he or she asserts an unsupported denial of actual drug use.

6. Whether Petitioner can establish any violation of his due process rights after certifying in writing that the chain of custody procedure at issue in his drug test had been properly handled.

7. Assuming a uniform federal rule is required regarding delegation of obligations under the Department of Transportation Regulations, whether employers should be held vicariously responsible for the actions of independent contractors who conduct the actual collections or whether employers may satisfy their obligations by establishing adequate procedures and retaining qualified independent contractors.

Federal Express respectfully requests that this Court deny Carroll's Petition for a Writ of Certiorari to review the judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on May 6, 1997.

LIST OF PARTIES AND CORPORATE AFFILIATES

Respondent Federal Express Corporation, a publicly held Delaware corporation, has no parent company and no nonwholly owned direct subsidiaries.

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OPINIONS BELOW

The opinion (Appendix to Petition, ("App.") A2-A9) of the Court of Appeals for the Ninth Circuit, No. 95-16603, is reported at 113 F.3d 163. The District Court's order granting Respondent's motion for summary judgment (App. B1-B16) and the District Court's entry of judgment of dismissal with prejudice (App. B17) were unreported.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals' decision affirming the District Court's entry of summary judgment for Respondent was entered on May 6, 1997. The jurisdiction of this Court to review the Ninth Circuit Court of Appeals' judgment was invoked by Petitioner under 28 U.S.C. § 1254(1).

REGULATIONS AT ISSUE

This case involves 49 Code of Federal Regulations ("C.F.R.") §§ 40.1, *et seq.* and §§ 391.71, *et seq.* (the "Regulations").

STATEMENT OF THE CASE

In an attempt to induce this Court to grant certiorari, Petitioner Richard Carroll has sought to characterize this case as having great significance for the continued viability and proper enforcement of mandatory federal drug testing schemes and the protection of individual due process rights. This is wholly inaccurate.

Carroll was fired by Respondent Federal Express Corporation after testing positive for use of cocaine, a dangerous, illegal drug which could have adversely affected his ability to drive his delivery van. The public policy interest in avoiding such unacceptable risk of death, injury and destruction of property is well established. One crucial fact is undisputed and undeniable: *Carroll certified in writing at the time of the collection of his urine sample that all requisite chain of custody procedures had been complied with.* Once his sample proved positive, however, Carroll then claimed that his prior certification was false and, because he had "never used drugs," the sample "must have" been switched or tampered with. Carroll submitted no competent or material evidence to show any error in

the drug collection process, chain of custody or testing procedure imposed by the DOT Regulations and adopted in Federal Express' own internal guidelines. Carroll's "evidence" in support of this claim amounts to no more than his biased verbal denial of drug use, and a personal physician's allegedly negative drug test, taken several days later and not under DOT-specified, controlled conditions.[1]

There is no need to grant certiorari in this case. Carroll improperly asserts, for the first time in his Petition, that federal rather than California law must govern Federal Express' duties to him. Carroll himself briefed and argued California law in both lower courts. Even if addressed on the merits, Carroll asks for an unmanageable and unrealistic "uniform federal law" holding employers strictly liable for non-compliance with the DOT Regulations. Carroll's proposed rule, as applied here, would allow every terminated employee a jury trial seeking damages (including punitives), without any actual or competent evidence of tampering, simply by swearing he or she never used drugs. This would eviscerate the mandatory drug testing programs designed to secure public safety and literally make the federal courts the ultimate arbiter of the accuracy of every positive drug test.

The DOT Regulations expressly permit employers to use independent urine sample collection and testing services. Federal Express therefore established drug testing procedures in full compliance with the DOT Regulations, hired a qualified, independent provider of collection services, and required that the provider comply with the Regulations. There is no claim that the provider was unqualified or that Federal Express' procedures were inadequate, just that Carroll's specific test was flawed. No far-reaching due process concerns are raised. *Carroll certified that the chain of custody procedure was properly followed.* If any deviation in proper chain of custody procedures occurred, it is

1. Federal Express told Carroll his private test was not valid and could not refute the official positive test sample as the delay between the two tests would have been sufficient to avoid detection of cocaine ingested prior to the positive test sample being provided. Moreover, Carroll's private test was invalid because it was not conducted under DOT-imposed, controlled conditions.

because Carroll failed to avail himself of the available protections. There is no claim of undue influence or coercion on the part of the collection service, or that Carroll was uninformed of the nature of the testing process or the serious consequences of a positive test result.

Carroll argues that absent his proposed uniform federal rule, "employers throughout this country" will disregard the drug testing requirements. To the contrary, all affected employers, including Federal Express, have tremendous incentive to comply with DOT-mandated testing procedures to avoid DOT enforcement action. Imposition of a "non-delegable duty" on employers is not necessary to ensure proper implementation of drug testing programs. There is *no evidence* in the record that Federal Express disregarded the Regulations or was itself involved in any wrongful conduct. Federal Express' business is air and express transportation not drug testing. There is no reasonable basis, or need, to expose Federal Express to liability under these circumstances. The Ninth Circuit was correct that an employer can discharge its duties under the Regulations in two ways: administer its own program or hire licensed outside services. *Carroll v. Federal Express*, 113 F.3d 163, n.2 (9th Cir. 1997). Carroll was free to sue the independent contractor for negligence, or the contractor's individual employees under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 308 (1971) but elected not to do so. As the Ninth Circuit correctly concluded: "Carroll may have a cause of action, but it does not lie against Federal Express." *Carroll, supra*, at 166.

Carroll's Petition states for the first time that his due process claim is premised on *Bivens*. In fact, Carroll never even mentioned *Bivens* in any submission to the District Court or the Ninth Circuit. Certiorari is inappropriate because Carroll's claim, as he now asserts it, fails as a matter of law for several reasons:

- a *Bivens* action may only properly be maintained against individuals, not corporate entities such as Federal Express. Carroll never sued the individual(s) who he claims violated his rights.

- Carroll's substantive due process claim cannot succeed because Federal Express cannot be considered a "federal" or "governmental actor" in terminating Carroll's employment, *as termination was not required by the DOT Regulations or any federal law*, but instead Federal Express' own private policies.

- Carroll's procedural due process claim incorrectly assumes that due process requires unwavering application of the DOT Regulations. Due process is a flexible concept depending on the particular situation. Carroll received fair warning, fair disclosure and fair opportunity to protect the integrity of his sample. Federal Express' procedures were in full compliance with the DOT Regulations.

The Ninth Circuit Court of Appeals properly affirmed the District Court's entry of summary judgment. Carroll's Petition should be rejected.

FACTUAL BACKGROUND

The Petition arises from an entry of summary judgment in favor of Respondent Federal Express and against Carroll, a former Federal Express employee. Applying its own employment policy, Federal Express terminated Carroll's employment as a courier after Carroll failed a random drug test. Carroll was required to take the test pursuant to United States Department of Transportation ("DOT") regulations found at 49 C.F.R. §§ 40, *et seq.* and §§ 391.81, *et seq.* (the "Regulations") and Federal Express' internal policies. (Excerpt of Record ("ER") 000003-000004.) Carroll tested positive for usage of an illegal drug, cocaine. (ER 000051, 000052.)

Federal Express is an international, air and express carrier with operations in all 50 states and abroad. Federal Express employs thousands of transportation personnel who operate jet aircraft, interstate trucks, local motor vans and other vehicles. DOT-couriers, such as Carroll, are subject to random drug testing.

(ER 000003-000004.) Pursuant to the Regulations, Federal Express was required to adopt a documented procedure for the collection, shipment and analysis of drug test samples from its transportation workers. 49 C.F.R. §§ 40.1; 391.83; 391.87; 391.93. Federal Express complied with the Regulations and established its own "Fitness for Duty/Drug-Free Workplace" policy (the "Policy") which provided testing guidelines and implemented a random drug test program. Federal Express' Policy made termination mandatory for an employee who tested positive for illegal drugs as a result of a random test. (ER 000025-000048, 000387-000436, 000549-000581.) In all other respects, Federal Express' drug testing guidelines mirror the provisions and requirements of the Regulations. (ER 000610.)

The Policy provided that its purpose was to protect public safety and the safety of co-workers: "Transportation employees who abuse drugs pose a particularly menacing safety threat to their co-workers and the public." (ER 000422.) Federal Express provided a written copy of the Policy to all affected transportation personnel, including Carroll, explaining in detail the purpose and implementation of the Policy. (ER 000464.) Among other things, the materials provided explained: how the collection process worked (ER 000393); that the tested employee would "witness the sealing and labeling of each specimen for shipping" (ER 000394); how the chain of custody process worked and how the security of the entire collection, shipping and testing process would be ensured. (ER 000396.) Moreover, Federal Express informed its employees, including Carroll, that they would be "asked to print your social security number and initials on the [specimen] container label and sign a form stating you watched the container being sealed." (ER 000418.) Carroll admits he received such information from Federal Express. (ER 000464.)

Carroll and his fellow Federal Express employees were expressly warned that "[i]f, after careful and extensive medical review, a test is verified positive, employment status with Federal Express is determined by management and personnel services and may result in termination." (ER 000028, 000421.) The Policy also specifically stated "[a]n individual's employment is terminated . . .

whenever an investigation confirms [the Policy] has been violated." (ER 000028.) One identified violation was "[a] verified positive drug screen [which] indicates drug(s) in [an] employee's system." (ER 000028.) Federal Express also instructed employees on how to appeal the results of a termination due to positive drug test through Federal Express' internal Guaranteed Fair Treatment Procedure ("GFTP"), including the presentation of appropriate evidence of innocence. (ER 000400.)

In order to implement a random testing program, Federal Express contracted with Options and Choices ("OAC"), an independent health services provider, to handle all aspects of the drug sample collection and chain of custody documentation. (ER 000292, 000293, 000294, 000298, 000305, 000332, 000480.) Federal Express relied on OAC's qualifications in assigning all collection responsibilities, and there is no claim or evidence OAC was not qualified or competent. (ER 000331.) Federal Express had no involvement in the actual collection or testing of samples collected from its workers. (ER 000331.) The actual analysis of all test samples was performed by two independent medical laboratories. (ER 000516, 000494, 000478.)

Federal Express provided OAC with its own Policy and the Regulations and instructed OAC to follow and comply with all of the provisions contained therein. (ER 000482-000483, 000489-000490, 000491, 000492, 000526.) In addition, Federal Express periodically audited OAC's collection sites to ensure proper sample collection and shipping procedures, and compliance with the Regulations. (ER 000475, 000485, 000520.) The nurse who collected Carroll's sample on the occasion at issue here was audited by Federal Express. (ER 000486, 000487, 000488, 000520, 000521, 000523, 000524.)

In accordance with its Policy and the Regulations, Federal Express randomly selected Carroll for a drug test and directed him to report to the sample collection facility in South San Francisco, California, on November 30, 1992. (ER 000437.) Carolyn West, a registered nurse employed by OAC, performed the actual collection of Carroll's drug test sample. (ER 000364.) In particular, West

instructed Petitioner on donating a urine sample, completion of related paperwork and handling of the chain of custody procedure. (ER 000366, 000367, 000368.)

Carroll testified in his deposition that he was asked to sign the chain of custody forms and the tamper-proof labels for his specimens before actually producing his sample and before West placed the identifying, tamper-proof seals and labels on his sample containers. (ER 000367-000368.)[2] West testified that, with respect to Carroll's sample collection procedure, she had no recollection of deviating from her customary sample collection and processing procedure — which included having the Federal Express employee sign the subject labels in her presence and watch her affix the labels to the specimen containers after donating the urine sample. (ER 000534-000540.) She acknowledged that she "may" have allowed a different Federal Express employee to complete the labels before going to the bathroom on one prior occasion (ER 000543-000544), but she had no recollection of Carroll signing his labels prior to her placing the labels on Carroll's specimen bottles or any other aspect of Mr. Carroll's sample collection (ER 000528-000535.)

Carroll did not object to any aspect of the sample collection or chain of custody procedure as conducted by West at the time he produced his sample. To the contrary, during the sample collection procedure, and consistent with West's testimony, Carroll signed and dated a chain of custody form which accompanied his specimen and provided:

> DONOR CERTIFICATION
>
> I certify that I provided my urine specimen to the collector, that the ***specimen bottle(s) was sealed with a tamper proof seal in my presence. I have initialed each bottle and that the information***

2. For some unexplained reason, Carroll has suddenly elevated West's conduct to "intentional" deprivation of his rights. (Petition, p. 4.) Carroll's previous allegations of West's conduct did not make this assertion. (*See* Carroll's Opening Brief to the Ninth Circuit, p. 7.)

provided on this form and on the label affixed to the specimen bottle(s) is correct.

(ER 000282, Respondent's Appendix A) (emphasis added.)

Following completion of the collection procedure, West caused specimens to be shipped in their tamper-proof containers to an independent testing laboratory. (ER 000527, 000531.) Carroll's sample was chemically analyzed and verified as positive for cocaine. (ER 000282, 000283, App. E69-E73.) Carroll was notified of the positive test result and requested that his "split sample" also be tested for verification purposes. (ER 000216-000217.)[3] The "split sample" also tested positive. (ER 000217.) Subsequently, and in accordance with Federal Express' Policy, Carroll was terminated from his job as a DOT certified van driver. (ER 000217-000218, 000268, 000273, 000274.)

Petitioner appealed his dismissal through Federal Express' Guaranteed Fair Treatment Procedure ("GFTP"), a multi-stage administrative review procedure conducted by senior Federal Express management which provides any disciplined, aggrieved or terminated Federal Express worker with the right to a review and the right to present evidence on his or her behalf. (ER 000218-000219, 000268-000274, 000381.) During his GFTP review, Carroll, for the first time, presented objections to the way his drug test sample had been collected. Specifically, Carroll claimed that he had been asked to fill out the chain of custody forms and specimen bottle labels for his test before donating his urine sample. He also asserted that he had not observed the OAC nurse fill out the forms, affix the labels and seal the sample bags in his presence. (ER 000267, 000268, 000273, 000274, 000367, 000368, 000370, 000371, 000372.) In addition, Carroll proffered his own drug test report, based on a drug test performed by his

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3. In the "split sample" test method, the test subject's sample is divided into two separate specimen containers. In the event the first sample tests positive, the second "split sample" is independently tested for verification purposes. (ER 000406-000407.)

personal physician approximately eight days after the "official" DOT test. (ER 000266, 000267, App. E74.) Carroll's private test purported to be negative. (ER 000266, App. E74.)

Carroll's evidence was considered and rejected by the GFTP Appeals Board. (ER 000438, App. E83.) The Appeals Board informed Carroll that his verbal claim of improper collection and chain of custody procedures was not credible in light of his written certification at the time of the sample collection that proper procedure had been followed. (ER 000274, 000383.) The Appeals Board rejected Carroll's own private drug test, noting that the passage of time following the original test, combined with Carroll's possible voluntary abstention from cocaine usage, could have eliminated any possibility of detection of cocaine ingested before the first test. (ER 000379.) Lastly, the Appeals Board rejected Carroll's objection that the collection site listed on the chain of custody form, *i.e.* Foster City, was not the site at which the sample had actually been collected. The review officer explained that the Foster City location was routinely listed on the forms because field assessment centers consistently designated one central location for signature by the nurse handling the collection procedure and that this location was not to be construed as the actual collection site. (ER 000274, 000375.) Based on these findings by the review Board, Carroll's appeal was denied and his termination was upheld. (ER 000273, 000274, App. E84.)

PROCEDURAL BACKGROUND

Following the final rejection of his appeal by the GFTP Appeals Board, Carroll filed suit only against Federal Express (not OAC or West) on October 29, 1993 in the San Mateo Superior Court in California. Carroll initially asserted nine claims for relief. (ER 000001-000024, App. E1-E29.) Federal Express removed the case to the District Court for the Northern District of California, and filed a motion to dismiss pursuant to FRCP 12(b)(6). The resulting order limited Carroll's complaint to three claims for relief: violation of his Fifth Amendment due process rights; breach of implied employment contract; and breach of the implied covenant of good faith and fair dealing implied in the alleged employment contract. (ER 000158-000172, App. C1-C18.)

After completion of discovery, Federal Express brought a motion for summary judgment which the District Court granted. The District Court ruled that Federal Express could not be held liable for any alleged acts or omissions of the independent contractor OAC, and that Federal Express did not owe a "non-delegable duty" to Carroll for OAC's alleged violations of the Regulations. On August 15, 1995, the District Court entered final judgment for Federal Express. (App. B1-B16; B17.)

Petitioner filed his Notice of Appeal of the District Court's entry of summary judgment to the Ninth Circuit Court of Appeal on August 17, 1996. (ER 000621.) After briefing of the issues and oral argument by Carroll and Federal Express, the Ninth Circuit affirmed the District Court's entry of summary judgment on May 6, 1997.

REASONS FOR DENYING THE WRIT

I. CARROLL IMPROPERLY SEEKS FOR THE FIRST TIME IN HIS PETITION TO RAISE HIS ARGUMENTS THAT "FEDERAL" LAW GOVERNS AND THAT HE HAS STATED A *BIVENS* CLAIM.

Generally, this Court will not decide a question not raised in the lower courts absent exceptional circumstances. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from federal courts that questions not pressed or passed upon below are reviewed.") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Carroll asks the Court to decide

> [W]hether federal law or the law of the state of the forum applies to construction of the Fifth Amendment to the United States Constitution, in determining the rights of a tested employee to due process under the Fifth Amendment.

(Petition at page 1, question 4.)

Carroll previously failed to raise this issue. In fact, Carroll argued California law at both the District Court and Ninth Circuit

levels. (ER 000001-000024, 000104-000135, ER 000332- 000345, Petitioner's Opening and Reply Briefs to Ninth Circuit.) Until he filed his Petition, Carroll never once made a reference to creating a uniform federal rule governing the application and administration of federal drug test schemes or to *Bivens, supra*, 403 U.S. 308. This Court should not grant certiorari to consider issues raised by Carroll for the first time at this stage of his lawsuit.

Understandably, the Ninth Circuit noted that the legal basis of Carroll's procedural due process claim was ambiguous and could be interpreted as either a claim under 42 U.S.C. § 1983 for violation of Carroll's civil rights or as a claim under California law for termination in violation of public policy.[4] *Carroll, supra*, 113 F.3d 165, n.1. Although Carroll chides the Ninth Circuit for its analysis (Petition, p. 6), any confusion is attributable to Carroll's failure to provide any clear, meaningful explanation of the basis for his claim. He has sent "mixed signals" throughout this case. For example, in his Petition, at p. 6, Carroll argues: "Since Section 1983 applies only to state actors, not federal actors, Carroll's claim is clearly not brought under Section 1983." But, in his Opening Brief to the Ninth Circuit, Carroll argued: "Defendant (which for purposes of the random drug test performed on Mr. Carroll, is a '*state actor*' or 'agent of the government'. . . ." (Emphasis added.) (Appellant's Opening Brief to Ninth Circuit, p. 17.) Moreover, Carroll argued extensively based on California law to both the District Court and Ninth Circuit. (ER 000332-000345, Petitioner's Briefs to the Ninth Circuit.) The Ninth Circuit cannot be faulted for not reading Carroll's mind or developing the theory of his case he now reveals in his Petition for the first time. The Ninth Circuit properly determined that Federal Express could not be held vicariously liable for OAC's actions under California law and this Court should not permit Carroll reconsideration based on new theories.

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4. California recognizes a tort claim for termination of an employee in violation of public policy. *See, e.g., TRW, Inc. v. Superior Court of Los Angeles County*, 25 Cal. App. 4th 1834 (1994), *cert. denied*, 513 U.S. 1151 (1995).

II. EVEN IF CARROLL'S *BIVENS* CLAIM IS CONSIDERED PROPERLY RAISED, IT IS WITHOUT BASIS AS A MATTER OF LAW.

A. *Bivens* Actions Cannot Be Maintained Against Corporations Such As Federal Express, But Are Only Properly Brought Against Individuals.

In *Bivens, supra*, 403 U.S. 308, this Court considered whether an individual could state a cause of action under the Fourth Amendment for injuries against *individual* narcotics agents for an alleged violation of that person's privacy rights. According to the petitioner in *Bivens*, the narcotics agents conducted a warrantless search of his apartment, employed unreasonable force and arrested him for alleged drug violations without probable cause. Petitioner filed a complaint in federal court against the individual agents seeking damages.

The narcotics agents argued that the rights asserted by petitioner were state-created rights of privacy and, therefore, petitioner had no federal claim for an alleged unconstitutional invasion of his rights. Rather, they argued, petitioner could obtain monetary damages only by an action in tort under state law in the state courts. *Bivens, supra*, 403 U.S. at 390. This Court held the petitioner could state a federal cause of action against *the individual federal agents* and was entitled to recover monetary damages for any injuries suffered as a result of the agents' violation of his Fourth Amendment Rights. *Id.* at 397. *Bivens* suits have subsequently been recognized under other constitutional amendments, including the Fifth Amendment. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979) (suit against congressman by former employee). Although *Bivens* permits actions for violation of the Fifth Amendment's Due Process Clause, a *Bivens* action may only be asserted against individual federal actors who commit a constitutional violation.

In *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994), Meyer sought damages for the alleged violation of his right to due process after the termination of his employment as a senior officer of Fidelity Savings and Loan

Association. He asserted a *Bivens* claim against the FSLIC as an entity. The issue before the Supreme Court was whether a cause of action could be brought against an agency of the federal government. Finding that the reasoning behind *Bivens* did not support such an extension, the Court confirmed that a *Bivens* action can only be maintained against an *individual* federal officer or officers. *Id.* at 473. "[T]he purpose of *Bivens* is to deter the officer." *Id.* at 485 (citing *Carlson v. Green*, 446 U.S. 14, 21 (1980)). In rejecting Meyer's attempt to expand the scope of *Bivens* actions, the Court concluded, "Meyer brought precisely the claim that the logic of *Bivens* supports — a *Bivens* claim for damages against Patullo, *the FSLIC employee who terminated him.*" *Id.* (Emphasis added.)

Carroll does not cite a single case extending *Bivens* to claims against a corporation such as Federal Express.[5] Instead, those cases Carroll relies on show he has misdirected his lawsuit. Citing *Carlson v. Green*, 446 U.S. 14 (1980),[6] Carroll carefully words his assertion:

> [I]t has long been obvious to this Court (as it should have been to the Ninth Circuit) that the liability of *federal actors* for violations of citizens' constitutional rights should be governed by uniform federal rules, not by the law of the forum.

(Petition at p. 7, citing *Carlson, id.* at 23) (emphasis added).

However, the referenced passage in *Carlson* actually provides: "Yet it is obvious that the liability of *federal officials* for violations of citizens' constitutional rights should be governed by uniform rules." (Emphasis added.) This is a critical distinction. Carroll has failed to state a valid *Bivens* action in that he sued none of the individual actors who allegedly

5. Nor did Federal Express' research of cases decided after *Meyer* reflect any recognized claim under *Bivens* other than against individual actors.

6. In *Carlson*, the defendant was the Director of Federal Bureau of Prisons, an individual.

mishandled his drug test sample. Instead, he only brought his claim against Federal Express in its capacity as a corporate entity. The Ninth Circuit properly held that Carroll may have had a cause of action, but it did not lie against Federal Express. *Carroll, supra* at 166.

B. Carroll Cannot Establish That Federal Express Was A "Federal Actor" As Required For His Substantive Due Process Claim Under *Bivens*.

Even if it were a proper defendant, Federal Express is a private actor, and its conduct is not subject to the Fifth Amendment unless Carroll can demonstrate such conduct constituted federal governmental action. *See Fidelity Financial Corp. v. Fed. Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987). This Court has held that merely because a business such as Federal Express is subject to extensive regulation does not establish that its actions are subject to the Fifth Amendment. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). In *Jackson*, this Court explained

> [T]he inquiry must be whether there is a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself.

Jackson, id. at 351 (emphasis added).

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court similarly analyzed the state action requirement of the Fourteenth Amendment, holding that a state is responsible for a private action only when that state has exercised coercive power or significant encouragement of the action, or when the private entity exercised powers traditionally exclusively the province of the government. *Blum, id.* at 1004-05.

Carroll describes his Fifth Amendment based claims as follows:

> Mr. Carroll seeks to vindicate his Fifth Amendment rights (ER 000012-000013) to procedural due process

> regarding the manner in which his drug test sample was collected in violation of the DOT Regulations, *and his substantive due process rights regarding Respondent's wrongful termination of his employment.*

(Petition, pp. 6-7) (emphasis added.)

The "challenged action" upon which Carroll's substantive due process claim is premised is Federal Express' termination of his employment. Yet, the DOT Regulations *did not* require Carroll's termination, merely that he not drive or perform "safety sensitive" duties. *See, e.g.*, 49 C.F.R. § 382.213 (driver cannot report for duty or remain on duty requiring performance of "safety-sensitive functions" if driver uses controlled substance); 49 C.F.R. § 382.501 (driver cannot perform safety-sensitive functions if driver violates alcohol or controlled substances prohibitions); and 49 C.F.R. § 391.95 (person who tests positive not be permitted to operate commercial motor vehicle or be on duty as a driver). Federal Express *did not* terminate Carroll pursuant to the Regulations; it is undisputed Federal Express did so under its own self-established employment Policy. (ER 000061; Petition, p. 16.) Although Federal Express' role in *testing* pursuant to the DOT Regulations may establish "governmental action,"[7] it did not in fact participate in the allegedly improper chain of custody documentation Carroll complains of. Federal Express' established procedures did not cause Carroll harm. Most importantly, Carroll cannot possibly establish Federal Express engaged in any "governmental action" in firing him.

Carroll cites *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), in support of the argument that his termination was a violation of his right to substantive due process. Carroll describes the holding in *Rendell-Baker* as "private party's termination of employee *under compulsion of law* is an action under color of law." (Petition, p. 15,

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7. *See Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 615-616 (1989) (holding that federally imposed random drug testing by railroads was "government action").

emphasis added.) Federal Express did not fire Carroll "under compulsion of law." Moreover, contrary to Carroll's characterization, the Court in *Rendell-Baker* actually rejected the assertion that a school's termination of certain employees constituted the state action necessary to those employees' claims pursuant to 42 U.S.C. § 1983 (the "state action" claim Carroll does not assert). Likewise, in *Fidelity Financial Corp., supra*, the Ninth Circuit held that even though a bank was created by federal government agency, closely regulated and "subject to unusually extensive managerial supervision by the Bank Board," the bank's loan activities could not be characterized as governmental action. *Fidelity Financial Corp., supra* at 1435-1456. Carroll assumes, but cannot as a matter of law establish either that Federal Express was a "federal actor" in deciding to terminate his employment or as to the "challenged action" because it is not the person who allegedly committed the wrongful act. Carroll cannot assert a viable substantive due process violation under *Bivens, supra*, 403 U.S. 308.[8]

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8. Likewise, Carroll's only explanation for the assertion that his employment constituted a protected property right under the Fifth Amendment is that he "had a cognizable property interest in his employment with Respondent", which was a legitimate claim of entitlement in remaining at his old job under Respondent's policy implementing the DOT Regulations. (Petition, p. 16.) To claim such a property interest, a person must have more than a "unilateral expectation", and instead a legitimate claim of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). *Roth* held that a protected property interest is not created by the Fifth Amendment, but by existing rules or understandings that stem from an independent source such as state law. *Roth, id.* at 577. The Federal Express employment policy provided to Carroll specifies that Carroll's employment was "at-will," and that the written procedures provided guidelines for management and employment "but do not create contractual rights regarding termination or otherwise." (ER 000440.) The District Court held, there was "no evidence that Federal Express or Carroll took any steps to incorporate the federal regulations as a term of Carroll's employment." (ER 000166.) Carroll did not appeal this ruling.

C. Carroll's Procedural Due Process Claim Is Based On The Erroneous Assumption That Strict Compliance With The DOT Regulations Is Required.

Carroll's theory is essentially that employers subject to the DOT Regulations should be strictly liable to guarantee unwavering compliance — even by independent collection and testing providers. Under the vehicle of a *Bivens* action, Carroll effectively seeks a private right of action under the Regulations,[9] like the third claim for relief in his original complaint for damages (ER 000013-000014). This claim was dismissed by the District Court (ER 000158-000172), an order from which Carroll never appealed.

The flaw in Carroll's analysis is that due process is not coextensive with the Regulations. Carroll makes this leap of logic without analysis. Due process is not a fixed concept. It is flexible and demands procedural protections in accord with the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). "Fair play" is the essence of due process. *See Galvan v. Press*, 347 U.S. 522, 530 (1954), *reh'g. denied*, 348 U.S. 852 (1954). Due process does not require an error free procedure, nor is it a guarantee of accurate results. *See Pinedo v. United States*, 347 F.2d 142, 148 (1965), *cert. denied*, 382 U.S. 976 (1966) (due process does not require "errorless counsel"); *United States v. Gallagher*, 183 F.2d 342, 345 (1950), *cert. denied*, 340 U.S. 913 (1951) (wrong decision on merits does not constitute denial of due process if opportunity for full hearing afforded). This Court has already acknowledged that regardless of the procedures employed for drug testing, it is "impossible to guarantee that no mistakes will ever be made in isolated cases" and that "no procedure can identify all impaired employees with ease and perfect accuracy." *Skinner, supra*, 489 U.S. at 629, and 632, n.10.

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9. "[Carroll] seeks to hold Respondent directly liable for its own failure and that of its contractor, OAC, to comply with the requirements of the DOT regulations." (Petition, p. 9.)

Mathews established a three-part test for whether procedural due process has been met:

> First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, 424 U.S. at 335.

These factors establish that Federal Express provided Carroll with more than adequate procedural due process. First, Federal Express established testing procedures which Carroll does not attack as inadequate. He merely attacks his individual test. The procedures complied with the DOT Regulations (ER 000491-000492), were provided to OAC, and OAC was required to comply with them. (ER 000482-000483, ER 000489-000490.) Federal Express "audited" OAC's collection sites and collection procedures to help ensure such compliance.[10] (ER 000474-000476, ER 000499-000501.) Carroll never claimed that OAC was not equipped or qualified to administer the collection procedure.

Second, Carroll was given a clear opportunity to protect the integrity of his sample. At the time Carroll gave the urine sample to OAC, Carroll signed and dated the chain of custody form which accompanied his test sample and explicitly stated:

> I certify that I provided my urine specimen to the collector, that the specimen bottle(s) was sealed with a tamper proof seal, in my presence. I have initialed each bottle and that the information provided on this

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10. The OAC employee who took Carroll's sample was herself interviewed by Federal Express' audit personnel and could not recall being criticized in any aspect of her work. (ER 000520-000521.)

> form and on the label affixed to the specimen bottle(s) is correct.

(ER 000282, 000589; *see* Exh. 1 in Appendix to Respondent's Brief.)

It is also worth noting Carroll was clearly warned that he was subject to drug testing, advised of the procedures and told that testing positive on a drug test would result in his termination. (ER 000028, 000421.) Carroll cannot possibly argue he did not receive a "fair warning" of the procedures and the seriousness of the program: a positive test would end his employment. *See United States v. Arcadipane*, 41 F.3d 1, 5 (1st Cir. 1994) (due process clause forbids government from depriving individual of liberty absent "fair warning of the consequences" of conduct). (Disapproval on unrelated grounds as stated in *United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996).)

The procedures established by Federal Express, including the use of OAC, do not create a significant risk of "an erroneous deprivation,"[11] nor is there any potential value, "of additional or substitute procedural safeguards." Carroll's only complaint is that contrary to his certification on his chain of custody form, he did not in fact see his samples sealed with a tamper proof seal or see specific labels affixed to his specimen bottles. (Petition, p. 14.)

D. Even If Due Process Were Considered To Require Strict Compliance With The DOT Regulations, Carroll Cannot Establish Any Violation.

Even if one accepts Carroll's contention that due process requires, without exception, strict compliance with the DOT Regulations, Petitioner has not established any violation. The Regulations establish minimum procedures to protect employees' privacy rights and to account for integrity of samples. 49 C.F.R. § 40.3; Vol. 53 Fed. Register No. 224 at 47137. Thus, an employer is required to "develop and maintain a clear, and well documented

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11. The Regulations explicitly permit use of outside providers for sample collection and testing. *See* discussion below at Section 3, B.

procedure for collection, shipment and accessioning for urine specimens under this part." 49 C.F.R. § 40.23. It is undisputed that Federal Express *did* establish such procedures, and Carroll does not claim otherwise.

Although he fails to specify the Regulations(s) that were supposedly violated, Carroll's claim appears to be based 49 C.F.R. § 40.25[12] and specifically sub-section (f) entitled "*Integrity and identity of specimen*" (emphasis in original). 49 C.F.R. § 40.25(f)(17) requires that the specimen be sealed with a tamper proof seal and labeled in the presence of the employee; (f)(20) requires that the subject initial the identification label to certify the specimen is from him or her; and (f)(22)(i) requires that the subject

> be asked to read and sign a statement on the drug testing and custody and control for certifying that the specimen identified as having been collected from him or her is in fact the specimen he or she provided.

Federal Express' procedures complied fully with these pertinent requirements. (ER 000393-000396, 000464, 000418.)

Carroll's post-test result claim that he did not actually see the sealing and labeling cannot possibly establish a violation of the Regulations actionable against Federal Express. If true, then Carroll participated in the violation, but certified it never occurred. He should not be heard to complain. Most importantly, if permitted to proceed, every employee who tests positive can create doubt concerning the result of his test and threaten his employer with litigation simply by denying the accuracy of the record of chain of custody the employee verified. This will undermine the mandatory drug testing program and inflict overwhelming injury to the public interest in safety.

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12. It should be noted that sub-section (a) of this statute expressly states: "An independent medical facility may also be utilized as a collection site provided the other applicable requirements of this part are met."

III. THERE IS NO NEED FOR A FEDERAL "NON-DELEGABLE DUTY" RULE.

A. The Regulations Do Not, As Carroll Asserts, Exist For The Purpose Of Protecting The Due Process Rights Of Tested Individuals.

The plain language of the Regulations makes clear that the drug test requirements are aimed solely at protecting the public from the dangers posed by intoxicated drivers who operate commercial motor vehicles: The purpose of this [Regulation] is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage. 49 C.F.R. § 391.81(a).

The *Federal Register*, emphasizes the same point:

> The overall goal of testing is to ensure a drug free transportation environment which, in turn, would reduce accidents and casualties in motor carrier operations. This rule is necessary to prohibit a driver from driving while that driver has a prohibited drug in his or her system or if that driver has used drugs as evidenced by a drug test showing the presence of drugs or drug metabolites. The rule is intended to ensure a drug free motor carrier work force and to eliminate drug use and abuse in the motor carrier industry.

Federal Register, Vol. 53, No. 224, Monday, November 21, 1988 at p. 47134.

* * *

> . . . the clear public interest in assuring that commercial motor vehicle drivers perform their duties free of prohibited substances provides justification for testing and its limited intrusion on privacy expectations of these individuals. . . . *The impairing effects of these drugs and the substantial risks to public safety posed by drivers who use drugs*

> *underlie the compelling governmental interest in the promulgate [sic] of this rule.*

Id. at 47137 (emphasis added.)

As the Ninth Circuit correctly concluded:

> The regulations requiring motor carriers to maintain a drug-free work force may produce the collateral benefit of increasing safeguards for the privacy of tested individuals, but its raison d'etre is the protection of the general public.

Carroll, supra at 166.

Carroll misconstrues the purpose of the regulations, and in reliance on certain quotes from the *Federal Register* (Petition, pp. 10-11) attempts to make the argument that the Regulations are equally intended to protect "all rights" of the employees of the motor carriers subject to the drug testing program. Certainly, removing intoxicated drivers from the road not only protects the public, but their fellow employees and other commercial drivers. And, while the *Federal Register* does refer to an intent to protect "the privacy of individuals who are tested,"[13] there is no inference that the regulatory framework itself "exists for the purpose of protecting the rights of tested individuals." *See Carroll, supra* at 166.

B. The Regulations Expressly Anticipate Employers Will Meet Their Drug Testing Obligations By Use Of Independent Collection And Testing Services.

Employers like Federal Express are in the air and express transportation, not the drug testing business. Recognizing this, the DOT established Regulations explicitly permitting the use of independent medical facilities to meet drug testing program obligations. *See, e.g.*, 49 C.F.R. § 391.87(l); 49 C.F.R. § 40.25(a); and (f)(22)(ii). Indeed, the Federal Highway Administration's Notice of Proposed Rule Making actually suggested random testing

13. Petition, p. 11.

by contract with an outside company for services, or forming industry groups or consortiums for this purpose. 59 *Federal Register* No. 224 at 47141. Obviously, under the foregoing, Federal Express cannot be faulted for delegating collection duties to OAC.

C. There Exists No Basis Or Need For The Creation Of A "Non-Delegable Duty" Rule.

The Regulations are silent on the issue of whether they impose some "non-delegable duty" on the employer. While the Regulations state that the employer "shall *ensure* that the test performed" conforms with 49 C.F.R. § 40[14], "shall ensure" cannot reasonably be construed to require that an employer do more than Federal Express has. What more could Federal Express do? Have its own employees observe and supervise every stage of the collection and testing procedures for every drug test? This would eliminate the benefit (clearly contemplated by the Regulations) of allowing companies to focus on their own business, and use experienced specialists who can conduct the testing efficiently and accurately. "Shall ensure" must be construed rationally and with common sense. Federal Express did ensure that tests of its employees were conducted properly, as it took every available and reasonable measure it possibly could. The alleged breakdown in procedure — assuming it actually occurred — was participated in by Carroll. Federal Express cannot guarantee absolute compliance with the Regulations if the employee being tested does not avail himself of the critical chain of custody protections and, instead, certifies they were complied with.

Carroll asserts that 49 C.F.R. § 40.1 must be interpreted to hold employers vicariously liable for errors in procedures by outside testing services. Section 40.1 reads:

> This part applies, through regulations that reference it issued by agencies of the Department of Transportation, to transportation employees including self-employed individuals, required to

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14. 49 C.F.R. § 391.111(b) (emphasis added).

> conduct drug and/or alcohol testing programs by DOT agency regulations and to such transportation employers' officers, employees, agents and contractors (including, but not limited to consortia). Employers are responsible for the compliance of their officers, employees, agents, consortia and/or contractors with the requirements of this part.

Although it is not altogether clear, it appears Carroll suggests the reference to "contractors" in § 40.1 renders compliance with the regulations a non-delegable duty. This too is not a common sense reading of the regulation. By "contractors," the Regulations refer to outside persons or entities such as truck drivers, which a transportation company like Federal Express might use to "contract" with. Such outside "contractors" would then also be subject to mandatory drug-testing under the Regulations. If the DOT had intended that the word "contractors" include outside independent drug collection or testing organizations, it would have used consistent language throughout the Regulations. Instead of referring to such outside testing services as "contractors", the DOT described them as "independent medical facilities." *See, e.g.*, 49 C.F.R. § 40.25(a); *see also* 49 C.F.R. § 391.87(l) which requires that administrative records "shall include agreements with collection facilities" and "laboratories", but does not reference "contractors."

Carroll's reliance upon *Skinner, supra*, 489 U.S. 602 (Petition, pp. 11-12) does not support a different interpretation of "contractors," or imposition of a non-delegable duty under the DOT Regulations. While *Skinner* provides that a "railroad may not divest itself of, or otherwise compromise by contract, the authority conferred by [the Regulations]", the Court discussed this restriction in the context of a collective bargaining contract or an arbitration award construing such a contract. *Skinner, supra*, 489 U.S. at 615. Thus, the restriction is "for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety." *Id.* Carroll's reliance

on *West v. Atkins*, 487 U.S. 42 (1988), and *General Building Contractors v. Pennsylvania*, 458 U.S. 375 (1982), does not change this conclusion.

In *West*, the petitioner was a prisoner who alleged he was refused necessary medical treatment by respondent, a physician who was under contract with the state of North Carolina to provide medical services to inmates in the state's custody. Petitioner claimed that respondent doctor had acted "under color of state law" and that the physician's acts and omissions constituted cruel and unusual punishment in violation of the Eighth Amendment. The Supreme Court determined that the state could not divest itself of its constitutional mandate under the Eighth Amendment. *West* is unhelpful to Carroll's case as it did not even consider a non-delegable duty issue, but only whether the physician could be sued pursuant to 42 U.S.C. § 1983. Unlike the petitioner in *West*, Carroll has not sued the individual he claims violated his rights. *West* has no bearing on whether vicarious liability should be imposed for another's conduct.

In *General Building Contractors*, African-American plaintiffs representing a class of minorities filed suit under 42 U.S.C. § 1981. The plaintiffs sought to redress alleged racial discrimination in the operation of a union hiring hall which was open only to Caucasians. *Id.* at 393. Even though § 1981 prohibited discrimination, this Court refused to impose a non-delegable duty to prevent that discrimination in the selection of a work force, because the statute did not create any duty in favor of the claimants:

> [T]o characterize such a duty as non-delegable is merely to restate the duty . . . the question is not whether the employers and associates are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is what duty does § 1981 impose. . . . The language of the statute does not speak in terms of duties.

In sum, Carroll's allegations and the record do not support a

claim that the intent of the drug testing Regulations, *i.e.* protection of public safety, is in any way jeopardized by Federal Express' delegation to OAC such that only OAC and its employees are responsible for any alleged violation of due process that *they* engage in. Federal Express was removed from the collection and evaluation procedures. There is no evidence, or even the appearance, that Federal Express tampered with the testing process. Such a lack of opportunity for interference by an employer and delegation to a trained, qualified independent contractor actually serves to significantly increase the reliability and legitimacy of the entire drug test procedure. Delegation to a qualified independent contractor should preclude any claim that the drug test was misused by an employer to discriminate against or terminate an employee under the pretext of a false positive test result.

D. Carroll Is Incorrect That Lawsuits By Terminated Employees Are Necessary To Ensure Compliance With The Regulations.

Carroll attempts to paint the following "parade of horribles:"

> If the Ninth Circuit's opinion is permitted to stand, this Court will allow employers throughout this country to disregard the requirements of federally mandated drug testing, to divest themselves of all responsibility and liability for violations of such regulations, simply by delegating the actual operation of the collection to third parties [sic] collection site personnel.

(Petition, p. 12.)

Federal Express does not seek to "divest itself" of responsibility under the Regulations. Again, it established guidelines and procedures as required by the Regulations, informed its employees of how the procedures functioned and took reasonable steps to ensure compliance.

It is naive and unfounded to imagine that the DOT would not enforce the Regulations, such that private lawsuits filed by

employees who test positive, are necessary to avoid non-compliance. Employers such as Federal Express have compelling incentive to comply with the Regulations. *See* 49 C.F.R. § 382.507, which provides: "Any employee or driver who violates the requirements of this part, shall be subject to the penalty provisions of 49 U.S.C. Section 521(b)." 49 U.S.C. § 521(b) puts employers at risk, among other things, of civil penalties (§ 521(b)(2)(A), criminal penalties (§ 521(b)(6), a safety/inspection/audit by the DOT (§ 521(b)(1)(B), and an order "to case all or part of the employer's commercial motor vehicle operations." (§ 521(5)(A)).

In reality, the "parade of horribles" is that which Carroll advocates. Employers who retain qualified independent medical facilities to conduct their collection and testing would live in fear of taking action on positive drug test results. If Carroll has his way, any employee, even if he or she has certified that the chain of custody procedures were followed, and without any direct evidence of tampering or switching, is entitled to a federal jury trial simply by claiming "I never used drugs." Such a swearing contest would be based on the faded memories of witnesses like OAC's Lindy West, who cannot possibly recall the precise details of each of the thousands of drug sample collections they may have performed. It would open the floodgates of litigation in Federal Courts and erase the drug testing program by allowing a jury to determine the accuracy of every positive drug test. It would fatally undermine the critical public goals behind the mandatory drug testing program.

III. CARROLL APPEARS TO HAVE ABANDONED HIS APPEAL FROM JUDGMENT ON HIS STATE LAW BREACH OF IMPLIED CONTRACT CLAIMS, BUT, IF THIS IS NOT THE CASE, THE NINTH CIRCUIT PROPERLY AFFIRMED JUDGMENT ON THESE CLAIMS AND THERE IS NO BASIS FOR A GRANT OF CERTIORARI WITH RESPECT TO THEM.

Carroll's initial complaint contained several claims for relief, including "breach of implied contract/wrongful termination" and "breach of the implied covenant of good faith and fair dealing."

(ER 000001, ER 000015-000020.) These claims are clearly based on California law, as they assert implied contractual rights in favor of Carroll to continued employment with Federal Express. Carroll's questions presented for review do not make any reference to these claims. As the rules of the Supreme Court of the United States require a petitioner to set forth all questions presented for review (Rule 14.1(a)), and the Petition does not clearly argue for such claims, it appears Carroll has abandoned them.

Nevertheless, contained in Carroll's discussion regarding "federal actors" on pages 15 through 17 of his Petition, is a curious passage asserting that Carroll had, with Federal Express,

> an implied agreement that it would not terminate Carroll's (or any employee's) employment because of testing positive on a drug test unless the employee did, in fact, test positive. . . . ¶ Respondent breached the contract, irrespective of any good faith belief on its part.

(Petition, p. 16.)

Out of caution, in the event this portion of Carroll's Petition is intended as an appeal from the Ninth Circuit order on his contract claims, Federal Express briefly addresses them.

Carroll cites the Court only to the District Court's decision on Federal Express' initial motion to dismiss (preceding any discovery), for the proposition that a trier of fact could determine that an implied term required "just cause" for Carroll's termination. (Petition, p. 16.) Carroll fails to advise the Court that the District Court subsequently granted Federal Express summary judgment on this claim. (ER 000618.) Likewise, Carroll fails to mention that the Ninth Circuit's decision which explicitly rejected Carroll's claim that Federal Express' drug testing policy created an implied contract, held that Federal Express acted in good faith under the terms of its personnel policy when it terminated Carroll. *Carroll, supra* at 167.

Carroll argues that Federal Express' good faith belief that cause existed for his termination "was not a substitute for good cause when its belief was, as here, factually incorrect." (Petition, p. 16.)

Citing to *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991), Carroll argues that a jury trial is required because a factual question exists when an employee denies the misconduct which is the basis for his termination. Again, Carroll has been less than forthcoming with this Court. *Sanders* is a case applying *Alaska* law, not California law. In fact, Alaska law places the burden of proof on the employer when good cause is required, and provides that a jury is entitled to decide whether the alleged misconduct actually took place, unless the facts are so clear that the issues can be decided as a matter of law. *Sanders, supra* at 194. *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 1231 (1989) correctly states California law: an employer's good faith belief, even if factually incorrect, will defeat breach of implied contract claims such as those Carroll asserted in his complaint.

Given Carroll's execution of a statement concurrent with the drug test that his sample was properly processed and Federal Express' adherence to its stated policy, Carroll's termination was appropriate as a matter of California law. Rule 10 of the Rules of the Supreme Court of the United States provides:

> A petition for a writ certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law.* (Emphasis added).

Carroll has not established any reason why this Court should accept certiorari with respect to his implied contract claims.

CONCLUSION

For the foregoing reasons, Respondent Federal Express respectfully requests certiorari be denied.

Respectfully submitted,

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APPENDIX A — DONOR CERTIFICATION

DONOR CERTIFICATION

I certify that I provided my urine specimen to the collector, that the ***specimen bottle(s) was sealed with a tamper proof seal in my presence. I have initiated each bottle and that the information provided on this form and on the label affixed to the specimen bottle(s) is correct.***

[Excerpt of ER 000282.]